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IN THE

Supreme Court of the United States

October Term, 1960
No. 72.

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.
Comment Upon Respondent's Introduction (Resp. Br. 8-15).

This must be kept in mind: although the particular factual situation in the case at bar is that of a writ of *habeas corpus ad prosequendum* issued extraterritorially by a district court concerning a prisoner who is in state custody, the legal question involved—whether the court has power to issue such an extraterritorial writ—is the same whether the prisoner is in federal or state custody. The question is one of jurisdiction—jurisdiction to issue process, absent Congressional sanction, outside the territorial jurisdiction of the court. To suggest unlikely situations but instances which will

illustrate the point, the problem is similar to that in which a federal district court in New York before which no suit had been filed, issues an order on its own ordering the transfer of a suit to it which suit had been filed in the federal district court in California,[1] or a case in which a federal district court in Nebraska ordered transferred to it the trial of a traffic case from a state court of Alabama. In neither suggested case would the district court have jurisdiction to make such an order. So the fact that here petitioner is in state custody is not a significant factor to the legal question involved in this case.

Petitioner is not seeking to defeat any power which the district court rightfully has. The question of the power of the district court to *try* petitioner is not involved in this case. The question involved is the simple one of the authority of the district court to issue the extraterritorial order which it did, an authority which, petitioner says, it did not and does not have. That is all that is before this Court. "The question is one of power, and not of the expediency of its exercise in the particular case, . . ." (*McGowan v. Moody*, 22 App. D.C. 148, 158 [1903].)[1a] "The question is not, whether Congress might, within the terms of the Constitution, have conferred this power on the Courts of the United States, in cases of this nature; but, have they done it?" (*Ex parte Cabrera*, 1 Wash. Rep. 232 [CC 3 1805]).

Accordingly, respondent's reliance (Br. 9-11) upon analogies to different processes (arrest and bench war-

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[1]Not a 28 U.S.C. 1406 situation.

[1a]This case was cited by this Court in *Ahrens v. Clark*, 335 U.S. at 190, with apparent approval.

rants) applicable to different factual situations (removal and forfeiture of bail) is of no assistance here.[2]

Nor does respondent's concern (Br. 11-14) for a possible forfeiture of petitioner's bond and its efforts to assist him in performing his contractual obligation supply the missing power. In the first place, what would be the legal procedure and the power of the court *in the event* of a default or forfeiture of the bond is not the problem in the case at bar. Secondly, it is far from clear—indeed the law is just to the contrary in a situation such as here—that there could be a forfeiture of the bond where the defendant left the jurisdiction of the court with the court's consent. In the very case (*Taylor v. Taintor*, 16 Wall. 366) cited by respondent (pg. 11), this Court said by way of dictum that there could not be a forfeiture in such a situation (16 Wall. 366, 21 L. ed. 287, 291). While in *Peckham v. Henkel*, 216 U.S. 483, such was the holding, as it was in *United States v. Vendetti*, 33 F. Supp. 34 (D. Mass. 1940).[3] In the case at bar, of course, petitioner not only left the district with the court's consent [R. 11, 25], but the court knew that at that very moment petitioner was in state confinement under a two year sentence [R. 24].

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[2]Incidentally, it is not accurate, as stated by respondent (Br. 10), that in a removal proceeding where the defendant is entitled to a hearing, the sole issue which may be contested is the identity of the defendant. *United States v. Parker*, 14 FRD 146 (DC DC 1953) and *United States v. Parker*, 14 FRD 447 (DC DC 1953) are examples of cases where other matters were gone into in the removal hearing and removal denied. *Cf. United States v. Wright*, 14 FRD 184 (D. Haw. 1954).

[3]Moreover the *Taylor* case, on analysis, does not stand for the proposition for which it is cited by respondent. It appears that defendant there was supposed to appear for trial in Connecticut on the third Tuesday of October, 1866. Reference to the calendar

As indicated at the outset of this Reply, respondent's reference (pg. 14) to the desirability of the use of the writ of *habeas corpus ad prosequendum* in a case such as this because of a possible conflict between state and federal governments does not assist here. The same problem of extraterritorial jurisdiction—or, rather, the lack thereof—is present where the defendant is in federal custody. And solicitude for a defendant's right to a speedy trial (*Cf.* Resp. Br. 15) did not supply the missing jurisdiction in *Phillips v. Hiatt*, 83 F. Supp. 935 (D Del. 1949) nor in *In the Matter of Karol Van Collins*, 160 F. Supp. 165 (D. Me. 1958) where reliance on that constitutional right was the precise ground for petitioners' argument to those courts.

Respondent assumes the very question to be decided when it says (pg. 15): "In criminal cases a district court of the United States has jurisdiction throughout the United States for the purpose of bringing a defendant before it for trial. It *therefore* (italics added) has power to issue a writ of *habeas corpus ad prosequendum* directed to any custodian anywhere within the United States."

The distinction which respondent seeks to make between criminal and civil cases does not assist here. The broader power a district court has with respect to subpoenas and warrants of arrest in criminal cases is there

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discloses that this was October *16*, 1866. Defendant did not appear, but he was not taken into custody by the New York authorities on the request of the Maine governor until October *19*, 1866. (16 Wall. 366, 21 L. ed. at 289). Accordingly, on and before the day defendant was to appear in Connecticut, he was not in custody. The case, therefore, though cited for the proposition that when a defendant leaves the jurisdiction without court consent and cannot return for trial because he is incarcerated, bail may be forfeited, does not actually support such a ruling because that was not the factual situation in the case.

only because Congress made *specific exceptions* as to *such* process. When Congress wishes the district courts to have extraterrotorial powers, whether the matters be criminal *or* civil, it knows how to say so and does. Thus, in connection with certain types of civil proceedings under the Sherman Act, Congress has provided for nationwide subpoena power (15 USC 5, 10, 25 and see 15 USC 22).[4]

The point is that, under settled principles of law, a district court has no power to speak extraterritorially unless given such power explicitly by Congress. Congress has given the district courts no power to issue extraterritorial writs of *habeas corpus ad prosequendum*. Neither of the statutes relied upon by respondents does so. Indeed, as we shall show, 28 USC 2241 expressly negates such power under that section, and, by reason of the legislative history, likewise negates the power under 28 USC 1651, even aside from the settled rule that the latter section does not and never was intended to extend the territorial jurisdiction of the court.

We will discuss the question of petitioner's right to challenge the district court's jurisdiction at the conclusion of this Reply.

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[4] *E.g.* 15 USC 10:

"Whenever it shall appear to the court before which any proceeding under section 9 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

And in the Food and Drug Act, it is provided (21 USC 337):

"All such proceedings for the enforcement, or to restrain, violations, of this chapter shall be by and in the name of the United States. Subpoenas for witnesses who are required to attend a court of the United States, in any district may run into any other district in such proceeding."

II.

A District Court Has No Power to Issue an Extraterritorial Writ of Habeas Corpus ad Prosequendum (Reply to Resp. Point II, pp. 16-29).

Because the writs of *habeas corpus ad subjiciendum* and *ad prosequendum* perform different functions, respondent contends that as to the latter the district courts have extraterritorial jurisdiction even though, concededly, as to the former, they do not. The theory seems to be that *ad prosequendum* is an "auxiliary" writ and therefore, somehow, the well-settled, historical rule that absent "specific exceptions created by Congress the jurisdiction of the district courts is territorial," does not apply. In so doing, respondent misunderstands the excerpt it quoted (Br. 23) from *Price v. Johnston*, 334 U. S. 266, 283, that "(t)he historic and great usage of the writ, *regardless of its particular form*, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause." (Italics added.) Rather than support an inference that this language means that the District Courts are given a different territorial jurisdiction as regards the two writs, the correct conclusion, we submit, is that the court's territorial jurisdiction to issue the writ, *regardless of its particular form*, is the same.

Respondent does not make clear in its reasoning (pg. 18) whether this asserted extraterritorial jurisdiction is posited on the argument that the "within their respective jurisdictions" clause of 28 USC 2241 is, by itself, to be interpreted as meaning extraterritorial, or whether the extraterritorial power must be derived from a combination of 2241 and 28 USC 1651, the latter because of the "necessary or appropriate in aid of their respective jurisdictions" language in that section. For clarity

of understanding, we will discuss first our thesis that the "within their respective jursidictions" clause of 2241 means territorial jurisdiction and since Congress has made no specific exception thereto, the district court has no extraterritorial power. We will then discuss how 28 USC 1651 gives no extraterritorial power. Indeed, we will show that because of Congress' action in 1948 in adding to the habeas corpus section the "for trial" provision of 28 USC 2241(c)(5), section 1651 does not apply at all and affords no power to the district court to issue writs of *habeas corpus ad prosequendum.*

A.

There Is No Such Power Under 28 USC 2241.

Respondent refers (Br. 18-19) to the statutory format prior to the consolidation into and enactment of section 2241, points out that 2241 was derived from R.S. 751, 752 and 753 (28 USC [1940 ed.] 451-452; see Appx. F to Petitioner's Open. Br.), that only 752 contained the language "within their respective jurisdictions", and concludes that, therefore, when Congress consolidated the sections into 2241 there was no intention to narrow the authority to issue, what respondent calls, ancillary writs of habeas corpus which have "generally" been "assumed" to extend outside the district. But respondent's historical analysis is not complete, nor does it go back far enough.[5] Before considering this,

[5]Moreover, one of the very cases (*Ponzi v. Fessenden*, 258 U.S. 254) upon which respondent relies (pg 16) is authority for the territorial limitation of R.S. 753 relating to writs of habeas corpus *ad testificandum* and *ad prosequendum* and hence of the same territorial limitation of 28 USC 2241 (c)(5). There this court said (258 U.S. at 261): "Under statutes permitting it, he (the prisoner) might have been taken, under the writ of habeas corpus to give evidence in a Federal court, or to be tried there, *if in the same district* (§753, Rev. Stat. Comp. Stat. §1281, 3 Fed. Stat. Anno. 2d ed. p. 462), . . ." (Italics added.)

however, we point out the obvious: extraterritorial jurisdiction to a district court cannot be "assumed". The rule is, as we have stated before and as is so clear, that *unless* Congress creates a specific exception, the district court's power is simply territorial; that's all and no more (*Ahrens v. Clark*, 335 U.S. at 190; *Georgia v. Pa. R. Co.*, 324 U.S. 439, 467; cf 28 USC 84 and 132). Respondent would like that rule to be evanescent, and it acts as if the rule were non-existent. The fact that there has been an "assumption" of power does not establish the existence of such power. (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 136)[6]

As we mentioned before, respondent did not go back far enough in its consideration of the legislative history precedent to section 2241.

As originally passed, the "all writs" statute and the *habeas corpus* statutes were in one and the same place: §14 of the Judiciary Act of 1789; 1 Stat 81. There-

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[6]All of the cases cited by respondents (f.n. 6, pg. 19) in support of its assertion that prior to the 1948 consolidation into section 2241 the courts had "generally assumed" that jurisdiction to issue writs of *habeas corpus ad prosequendum* extended outside the district, are post 1948 cases; two (*Streck v. McGrath*, 191 F. 2d 347 and *Hill v. United States*, 186 F. 2d 669) being in 1951, and the other two (*Taylor v. United States*, 238 F. 2d 259 and *U.S. ex rel. Moses v. Kipp*, 232 F. 2d 147) being in 1956. Accordingly they can hardly be said to support the proposition that there was any reliance on them when Congress acted in 1948. Moreover, in none of these cases was any question raised as to the power of the court to issue the writ extraterritorially. And, as already mentioned, the cases which have specifically passed upon the question have not only not "assumed" that there was extraterritorial jurisdiction but, on the contrary, have held that there was not such jurisdiction even in aid of the constitutional right to a speedy trial. (*Phillips v. Hiatt*, 83 F. Supp. 935 [D. Del. 1949]; *In the Matter of Karol Van Collins*, 160 F. Supp. 165 [D. Me. 1958]; *cf. Edgerly v. Kennelly*, 215 F. 2d 420 [CA 7 1954.])

after, various amendments were made to the habeas corpus section of the Judiciary Act all to the effect of adding to the power of the courts. See Appendix F to Petitioner's Opening Brief.[7]

The thrust of these various changes was to add progressively to the courts' powers concerning habeas corpus, because the law was and is crystal clear, as set forth by this Court in *Ex parte Bollman,* 4 Cranch 75, 93-94, that

> ". . . (C)ourts which are created by written law and whose jurisdiction is defined by written law, cannot transcend that jurisdiction . . . for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but *the power to award the writ* by any of the courts of the United States *must be given by written law.*" (Italics added.)

The *Bollman* case described the various forms and purposes of the writ of habeas corpus, including *ad prosequendum* (4 Cranch at 98).

The succeeding changes in the habeas corpus provision of the Judiciary Act of 1789 (§14; 1 Stat. 73, 81) are related in *Cunningham v. Neagle,* 135 U.S. 1, 34 L.ed. 55, 73-74.[8] Thus, the federal court's power to issue writs of habeas corpus under the first Judiciary Act was limited to those situations where the person was in jail or custody under or by authority of the

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[7]For the convenience of the Court and counsel we set out as Appendix A hereto in capsule form the pertinent substance of the various amendments to §14 of the 1789 Act up to today's 28 USC 2241 and 1651.

[8]*Cf.* Appendix F to Petitioner's Opening Brief, and Appendix A hereto.

United States or committed for trial before some court of the same or when necessary to be brought into court to testify (*Cunningham v. Neagle,* 34 L.ed. at 73; 1 Stat. 81).

Since the power thus given did not authorize habeas corpus where the states imprisoned federal officers for attempting to enforce the federal tax laws, the act was amended in 1833 to give power to the federal courts to issue the writ where such a prisoner was confined by reason of such conduct (*Cunningham v. Neagle,* 34 L.ed. at 74; 4 Stat. 634).

Then, in 1842, a further extension of the federal courts' power was made to permit the writ where the custody was under the sanction of a foreign power and the validity thereof depended upon the law of nations (*Cunningham v. Neagle,* 34 L.ed. at 74; 5 Stat. 539).

The fourth extension was in 1867. In effect, it granted the federal courts the broad power, now extant, to issue writs of habeas corpus, and included all cases of restraint in violation of the Constitution or laws or treaties of the United States (*Gunningham v. Neagle,* 34 L.ed. at 74; 14 Stat. 1867).

Thus stood the format of the habeas corpus and "all writs" statutes at the time of the Revised Statutes in 1875: the power to issue "all writs" and the power to issue habeas corpus to bring a prisoner into court to testify or when he was in custody under authority or color of the United States were in one statute (1 Stat. 81) and successive extensions and amendments were made in 1833 (4 Stat. 634), 1842 (5 Stat. 539) and 1867 (14 Stat. 385). It was because Congress had not given the courts power to issue habeas corpus for these

added purposes, that Congress had to pass the specific legislation.[9]

The phrase, "within their respective jurisdictions" first appears in the 1867 amendment which was the passage of H.R. 605 of the 39th Congress. The bill was specifically denominated as being "to amend an act to establish the judicial courts in the United States, approved September 24, 1789." (Part 1, Cong. Globe, 39th Cong. 2d Sess. pg. 730). As first introduced, the bill did not have the qualifying phrase (ibid). The debate in the Senate[10] makes clear that while the chairman of the committee in charge of the bill felt the bill was not subject to extraterritorial construction,[11] the qualifying

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[9]*Cf. Ex parte Dorr*, 3 How. 103, 105, 11 L. ed. 514, 515:

"The power given to the courts, in this section, to issue writs of *scire facia*, *habeas corpus*, &c., as regards the writ of *habeas corpus*, is restricted by the proviso to cases where a prisoner is 'in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable.

"Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. . . ."

[10]There was apparently none reported as to the House, the House simply concurring in the Senate's amendment to add the words (Part 2, Cong. Globe, 39th Cong., 2d Session, pg. 899).

[11]"Mr. Trumbull.

"When this bill was up the other day the Senator from Maryland suggested that under it a judge of a United States court in one part of the Union would be authorized to issue a writ of habeas corpus to bring before him a person confined in another and a remote part of the Union. I do not think the bill is susceptible of that construction. I think the judges and courts would under the bill be confined to their respective jurisdictions; . . ." (Part 2, Cong. Globe, 39th Cong. 2d Sess. pg. 790).

phrase was inserted so as to remove any doubt thereof (Part 1, Cong. Globe, 39th Cong., 2d Sess, pg. 730; Part 2, Cong. Globe, 39th Cong., 2d Sess., pg. 790). Likewise, the debate mentioned makes clear that the "within their respective jurisdiction" phrase was intended specifically to refer to territorial jurisdiction.[12]

When the various statutes above discussed were consolidated and simplified in 1875 into the Revised Statutes,[13] the plan of Congress is apparent. The first sentence of the 1789 statute, the "all writs" portion, was put into R.S. 716, and the various portions of the habeas corpus statutes (the original as well as the amendments) were put into R.S. 751, 752 and 753.[14] Thus, the first portion of the 1789 act giving the *courts* power to issue writs of habeas corpus was placed in section 751. The second portion of the 1789 act giving the various federal *judges* the power to grant writs of habeas corpus for the purpose of an inquiry into cause

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[12]*Cf.* f.n. 11, *supra*. Mr. Trumbull then went on to say *(ibid)*: "but if the language is so broad that the Senator from Maryland thinks it may be susceptible of that construction, I shall have no objection to amending it by inserting after the word 'courts' in the fourth line of the first section the words 'within their respective jurisdictions;' so that it would then read, 'that the several courts of the United States and the several justices and judges of such courts, within their respective jurisdictions,' etc. If that will meet the views of the Senator from Maryland, I will move that amendment, or if he prefers, he can move an amendment in such form satisfactory to him as will accomplish the same object."

Whereupon, Mr. Johnson, the Senator from Maryland, replied: ". . . The amendment proposed by the honorable chairman is entirely satisfactory to me and removes that difficulty."

[13]There was actually no revision or change.

[14]While R.S. 716 still continued the language that the courts had power to issue writs of *scire facias*, reference to *habeas corpus* was omitted, obviously because that writ was covered by the other sections, 751-753. Reference to *scire facias* was eliminated from the section in the 1948 codification (28 USC 1651; 62 Stat. 944).

of commitment, was placed in section 752,[15] as was also the "within their respective jurisdictions" phrase of the 1867 Amendment placed therein. And, finally, the third portion of the 1789 Act, the *proviso*, restricting the power to issue writs of habeas corpus in cases of prisoners to the situation where it was necessary to bring him into court to testify or when in custody under United States authority, and the various extensions to the proviso effected by the 1833 (in custody for an act done pursuant to United States law), the 1842 (in custody by reason of foreign law or the law of nations) and the 1867 (in custody in violation of the Constitution, law or treaty of the United States) amendments, were placed in section 753.

The 1940 United States Code edition (28 USC [1940 ed.] §§ 451, 452 and 453, respectively) contained the same format as the Revised Statutes (§§ 751, 752 and 753, respectively).[16]

Finally, the 1948 codification put all three sections, including the 1911 and 1925 amendments (see f.n. 16, *supra*) into one section, the present 28 USC 2241. What was 28 USC (1940 ed.) 451 and 452 became subsection

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[15]The words "for the purpose of an inquiry into cause of commitment" were changed to "for the purpose of an inquiry into the cause of restraint of liberty." but we do not believe this to have been a substantive change. Also, the portion here in question in the 1789 Act referred only to the justices of the Supreme Court and the judges of the district courts, while R.S. 752 made clear that it also applied to circuit judges.

[16]A 1911 enactment (36 Stat. 1167) simply stated that the powers given to circuit courts were likewise given to district courts. And a 1925 amendment (43 Stat. 940) granted the right of appeal in habeas corpus matters and stated that a circuit judge had the same power to grant writs of habeas corpus within his circuit as a district judge had *within his district.*

(a) of 28 USC 2241 and what was 28 USC (1940 ed.) 453 became subsection (c).[17]

The result of all this is that in making the 1948 consolidation, Congress put back into one statute the district courts' power to issue writs of habeas corpus and returned to the same format which it had used in section 14 of the Judiciary Act of 1789 (1 Stat 81). And by the same token, the same kind of statutory interpretation which had been made by this Court of the first statute is applicable today. That is, section 2241 is an integrated statute, each part having to be read in the light of the other parts and each part being modified by the other parts.[18]

In *Ex parte Bollman*, 4 Cranch 75, at which time, as explained above, the statute (1 Stat. 81) gave the courts and judges general power to issue writs of habeas corpus, "for the purpose of an inquiry into cause of commitment," with the proviso that as to "prisoners in gaol" the writ could only issue where the prisoner was in custody by virtue of the authority of the United

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[17]Subdivision (b) which granted the Supreme Court and the justices thereof and the circuit judges the right to decline an application for writ of habeas corpus and to transfer the application to the district court having jurisdiction to hear it, was added for the orderly administration of justice so that such judges would not be in a position of disqualification or be burdened by applications which should go to the district courts (80th Cong., House Report No. 308). The 1948 amendment also added as a part of subsection (c)(5), the proviso regarding issuing the writ to bring a prisoner into court "for trial." The significance of this amendment in relation to its application to 28 USC 1651 will be discussed below.

[18]Likewise the various expansions during the years (1833, 1842, 1867) must be read as modifying and being modified by the basic power given by the Congress to the courts to issue writs of habeas corpus in the First Act.

States *or* where necessary to bring him into court to testify, this Court said (4 Cranch at 99):

> "This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by the courts—where the person is necessary to be brought into court to testify. . . ."

By the same token today: the "within their respective jurisdictions" proviso of subsection (a) of 2241 likewise "extends to the whole section." Since it is so clear that when Congress used the words "within their respective jurisdictions," it meant those words to mean "territorial," the whole of subsection (c), including the "for trial" provision is affected thereby. The argument of respondent that "the within their respective jurisdictions" applies to only *ad subjiciendum* is refuted by the legislative history reviewed, as well as by the ordinary meaning to be attributed to the words.

The insertion by Congress in 1867 of the "within their respective jurisdictions" language in the "inquiry into the cause of restraint of liberty" section is the same as though Congress had done so in the original "inquiry into cause of commitment" portion of the 1789 Act. In both, the power so given was modified by the proviso portions which followed; in the ensuing sentence in 1789; in the ensuing section in 1867 and in subsection (c) of 2241 in 1948.

It cannot be gainsaid, as respondent appears to attempt to do (pg. 19), that the district courts were *specifically given* extraterritorial power with respect to warrants of arrest (Rule 4[c][2], 9[c][1], Federal Rules of Criminal Procedure) *because* the law as laid

down in *Palmer v. Thompson*, 20 App. D. C. 273 (1902) and *Mitchell v. Dexter*, 244 Fed. 926 (CA 1 1917) was accepted as correct, the dictum in *Biddle v. Thiele*, 11 F. 2d 235 (CCA 8 1926) and *In re Christian*, 82 Fed. 885 (CA WD Ark. 1897) to the contrary notwithstanding, and that without such specific authorization the general rule would apply. (See notes of Advisory Committee on Rules, note to Rules 4(c)(2), 9.)[19] If Congress should see fit to except the process in the case at bar, that is one thing: but it has not done so, and unless it does, the general rule must apply.

Respondent's reliance (pg. 20) upon this Court's citation in *Albrecht v. United States*, 273 U.S. 1, 8, of *United States v. John Kelso Co.*, 86 Fed. 304 (ND Cal. 1898) and *United States v. Standard Oil Co. of Indiana*, 154 Fed. 728 (WD Tenn. 1907) is misplaced.

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[19]For example, the court in *Palmer v. Thompson*, 20 App. D.C. 273, 279-280, said:

> "We may assume that it would not be incompetent for Congress to enact that, *as occasion might require*, the writs of the Federal court of any Federal district of the Union might be executed in any other Federal district, and might be directed to the marshal of such other Federal district for execution. But *in the absence of specific statutory enactment* to that effect, it is undoubtedly the general rule of law that no court has authority or jurisdiction beyond the territorial limits of the district for which it has been established, notwithstanding that it may be, as in the present case, only one of numerous similar courts of the same sovereignty . . . [W]e do not find in the statute law the evidence that it has done anything of the kind. In our opinion neither section 1014 nor section 716 of the Revised Statutes purports to grant any such power. The provisions of section 1014 are certainly inconsistent with the theory of such a grant of power; and *there is no good ground to construe the power granted in section 716*, 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law,' *as intended to abolish the restrictions inherent in territorial limitation.*" (Italics added.)

No question of extraterritoriality was at all involved in *Albrecht*. The only question was whether a court could obtain jurisdiction over a defendant who, by making a general appearance and failing to move to quash the warrant of arrest, appeared without an arrest having been made. Said the court (273 U.S. 1, 8-9):

> ". . . That a defendant may be brought before the court by summons, without an arrest, is shown by the practice in prosecutions which are necessarily commenced by summons. Here the court has jurisdiction of the subject matter; and *the persons named as defendants were within its territorial jurisdiction*. . ." (italics added)

It was after the first sentence in the above quotation that this Court, in footnote 8, page 8 of 273 U.S., cited the *John Kelso* case and noted that that case was followed by the *Standard Oil* and other cases. It was for the proposition that summons is the proper way to obtain jurisdiction over a corporation in a criminal case, that *John Kelso* was cited, *not* for the proposition that the district court had extraterritorial jurisdiction to do so. There was no territorial jurisdiction problem in the *John Kelso* case at all. And it is to be noted that for the extraterritorial question the *Standard Oil* case relies (154 Fed. at 728) on the not followed dictum in the *In re Christian* case, 82 Fed. 885 (CC Ark. 1897).

As the notes of the Advisory Committee on Rules, referred to above, show, respondent is simply not correct when it states (pg. 21) that "The Federal Rules . . . embody and make explicit in certain defined situations the *pre-existing* view, . . . that in criminal cases district courts of the United States may, . . . issue

such process as is necessary to acquire jurisdiction of the defendant." (Italics added). To the extent that this is intended to mean that absent the specific exemption in the rules with regard to warrants, for example, the district courts have nation wide power, this is just not the law, as the *Mitchell v. Dexter, supra*, and *Palmer v. Thompson, supra*, cases followed by the change in the Rules show.

B.

There Is No Such Power Under 28 USC 1651.

Respondent's reliance (pg. 21, f.n. 8) on the fact that at common law the English practice had no problem of territorial limits with regard to writs of *habeas corpus ad prosequendum* as, for example, from England to Ireland, is misplaced. This is so not only because of the different jurisdictional set-up of the English courts, but also because the same was true of the writ of *habeas corpus ad subjiciendum*.[20] "Accordingly, the practice in the English common law courts is no argument that extraterritorial jurisdiction of the federal

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[20] 1 Chitty's Cr. L. (1847) pg. 119: "The habeas corpus ad subjiciendum . . . is deemed a prerogative writ which the king may send to any place, he having a right to be informed of the state and condition of every prisoner, and for what reason he is confined."

IV, Bacons Abridgment (1832) under the title: "Of the Habeas Corpus ad Subjiciendum.": "It hath already been observed, that the writ of *habeas corpus* is a prerogative writ and that therefore, by the common law, it lies to any part of the king's dominions; . . ." And the abridgment points out specifically that it runs to Ireland. See also, The Habeas Corpus Act 31 Car. 2, c. 4, § 11; and the Act of 56 Geo. 3, c. 100 §5. For the English law today, see II Halsbury's Laws of England, 3d Ed., pp. 29-31; and as to writs of habeas corpus other than *subjiciendum*, see pp. 51-52. For a longer discussion, see the Government's brief in *Johnson v. Eisentrager* (339 U.S. 763), pp. 33-49 under the topic: The Territorial reach of the Writ at Common Law; the English Habeas Corpus Acts; modern English decisions."

courts exists. *Ahrens v. Clark*, 335 U.S. 188 is irrefutable proof of that.

Indeed, a careful analysis of *Ahrens v. Clark*, demonstrates that all the members of this Court were in agreement that extraterritorial power does not exist under the facts in the case at bar, namely, where *both* the custodian *and* the prisoner are outside the territorial jurisdiction of the court. Thus, the dissent in *Ahrens* which felt that the district court had jurisdiction to issue the writ in that case, said (335 U.S. at 195, f.n. 3):

> "Congress has not given the District Court power to direct service of the writ to be made outside the limits of the state in which the court sits. . . ."

The dissent started (335 U.S. at 202) "from the accepted premise that . . . the jurisdiction of the district court is territorial" (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 467, 468) but went on to say that in that case there was (p. 203) "no problem of issuing process outside the District of Columbia . . . with which alone . . . the statutory phrase (within their respective jurisdictions) sought to deal." Accordingly, we submit, that even under the view of the dissent in *Ahrens*, where, as here, both the custodian and the prisoner are outside the jurisdiction of the district court, Congress having enacted no exception, the attempt to assert extraterritorial process must fail.

Adams v. McCann, 317 U.S. 269, cited and quoted from by respondent (pp. 22-23) does not assist in the case at bar. The fact that a court (in that case a circuit court of appeals) has power to issue a writ of habeas corpus in aid of its appellate jurisdiction does

not reach, nor help on, the question as to whether it has extraterritorial power to do so. In the *Adams* case there was no question of extraterritoriality. The prisoner was in the custody of the United States marshal right in the City of New York—well within the territorial limits of the court [Record on Appeal, pp. 1-4].

The same is true of *Price v. Johnston*, 334 U.S. 266, 279-283, relied upon by respondent (pp. 23-24). There, too, there was no territorial problem, the prisoner being in Alcatraz, within the jurisdiction and within a stone's throw of the 9th Circuit Court of Appeals. Contrary to respondent's reading of the *Price* case that it would support extraterritorial jurisdiction in the Courts of Appeal to issue writs of habeas corpus, the case specifically disavows any such speculation. Said this Court (334 U.S. at 284):

> "Formulation of the limitations of §262 which do exist must await the necessities of appellate jurisdiction in particular cases. . . ."

Moreover, *In re Boles*, 48 Fed. 75 (CCA 8 1891), which had such a question presented to it, decided against respondent's view. The court there said (48 F. at 76):

> ". . . [W]e cannot issue the writ in question to be served in another circuit, merely because the petitioner is there confined in execution of a sentence imposed by one of the district courts of the territory of Oklahoma . . ."

We have already discussed *United States v. Hayman*, 342 U.S. 205 (Open. Br. 11-14). What respondent fails to appreciate, we submit, is that 28 USC 2255 is a special statute which clearly indicates extraterritorial jurisdiction in the special situation there provided

for. The same cannot be said of the general statutes which give district courts jurisdiction over crimes committed within their respective jurisdictions—their districts. Such jurisdiction, having 6th Amendment Constitutional roots, is simply not sufficient to overcome the strength of the rule of territorial jurisdiction unless Congress makes a specific exception. We submit that it takes more than the mere fact that the court has jurisdiction over the case and the defendant to permit of the exercise of extraterritorial power. Something more is required of Congress before this can be permitted. *Cf. Ahrens v. Clark*, 335 U.S. 188 at 191.

In *United States ex rel. Knapp v. Lake Shore & Michigan Southern Railway Company*, 197 U.S. 536, the Interstate Commerce Commission had instituted an action in the circuit court for mandamus to compel an interstate carrier to make a report which the ICC had the right to require. The defendant contended that the court had no jurisdiction over an original action in mandamus. The Government replied to this by agreeing to that general proposition but arguing that under various sections of the Interstate Commerce Act the Commission is given the authority to inquire into the management of common carriers and to obtain from them complete information to enable it to perform its duties; that the Commmission is authorized to enforce the provisions of the Act; that the Commission may require the filing of reports and the fixing of the time thereof; that it is the duty of any district attorney of the United States to institute and prosecute all necessary proceedings for the enforcement of the Act; and hence, the power of the Commission to require the report being undoubted (p. 542), "the Commission has the power

to enforce obedience to the order." To which this Court replied (197 U.S. at 542-543):

> "But in what way? Manifestly only in such way as the courts have jurisdiction to give. . . . Such power cannot be inferred from the grant of authority to the Commission to enforce the act, or from the direction to district attorneys or the Attorney General to institute 'all necessary proceedings for the enforcement of the provisions' of the act . . ."

So here. The mere fact that the district court may have criminal jurisdiction over a matter is no basis for the inference that section 1651 grants extraterritorial power to issue a writ of habeas corpus, particularly in the light of the strong rule that for the existence of extraterritorial power there must be a specific Congressional exception.

The arguments of respondent (pp. 27-29) as to why there *ought* to be extraterritorial jurisdiction in this kind of a case are better addressed to Congress in support of an argument for the enactment of an exception. But for the purpose of this case they fail to show that the exception was created.

Needless to say, the cases with which respondent disagrees (f.n. 10, pp. 29-30) do, we submit, represent the correct law.[21]

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[21]Respondent seeks to minimize the force of the 7th circuit's decisions in *Edgerly v. Kennelly*, 215 F. 2d 420 (1954) and *Goldberg v. Hoffman*, 225 F. 2d 463 (1955) by suggesting that that circuit's later decision in *United States ex rel. Moses v. Kipp*, 232 F. 2d 147 (1956) modified that court's earlier views as to the nonexistence of extraterritorial power to issue the writ here in question. Such a conclusion is not permissible. Not only was the question of jurisdiction to issue the writ extraterritorially not raised

(1) *Congress Has Made Clear That the Courts Have No Power to Issue the Writ of Habeas Ad Prosequendum Under 28 USC 1651.*

As seen, respondent makes an extensive argument (pp. 22-29) to the effect that under 28 USC 1651 the district courts have, or should have, the power to issue writs of *habeas corpus ad prosequendum* ancillary to or in aid of their general criminal jurisdiction. We have shown, we believe, that 1651 cannot be said to confer extraterritorial power.

But whatever may have been the correct interpretation prior to 1948, we believe that since that time there is no power permitted to the federal courts to issue writs of *habeas corpus ad prosequendum* under section 1651. This is so for the following reasons: Prior to 1948 the habeas corpus statute, as such, as distinguished from the "all writs" statute, contained no reference to, nor any language which could be interpreted as meaning, the writ of *habeas corpus ad prosequendum*. Section 14 of the Judiciary Act of 1789 (1 Stat. 81)

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in the *Moses* case nor were the two cases mentioned, cited, but in the still later case of *United States ex rel. State of Wisconsin v. First Federal Savings and Loan Association*, 248 F. 2d 804 (1957), the court took pains to say (pg. 808):

"The general jurisdiction of federal district courts is limited and defined strictly by statute. We cannot look beyond Congressional enactments to determine the extent or scope of this jurisdiction . . .

"This provision [1651(a)] does not enlarge or expand the jurisdiction of the courts but merely confers auxiliary jurisdiction where jurisdiction is otherwise granted and already lodged in the court . . . In passing upon the meaning and purpose of this section this court has said:

'(w)hile the section augments the power of the court in cases of existing jurisdiction, it in no wise expands or extends its territorial jurisdiction.'

Edgerly v. Kennelly, 7 Cir., 1954, 215 F. 2d 420, 422."

gave courts power to issue the writ of *habeas corpus ad testificandum* by its "necessary to be brought into court to testify" language, but said nothing about a prisoner being brought into court "for trial." So stood the statutes until the 1948 codification. None of the amendments, revisions or codifications (1833, 1842, 1867, 1875, 1911, 1925, 1940) said anything about power to bring a prisoner into court "for trial." Accordingly, it is arguable that the "all writs" portion of the 1789 statute and its successors (R.S. 716, Jud. Code 262, 28 USC [1940 ed.] 377) could have been looked to as the source of power for the courts to issue the *ad prosequendum* writ.[22]

However, in 1948 Congress specifically put the power to issue the writ of *habeas corpus ad prosequendum* into the habeas corpus statute. Hence, in subsection (c)(5) of 28 USC 2241 for the first time, is set out the power to issue the writ of habeas corpus "to a prisoner . . . to bring him into Court . . . for trial." When Congress did this it took out of the "all writs" statute the power to issue *ad prosequendum*, and whatever power the federal courts have with relation thereto is now in the *habeas corpus* statute itself. This is the only conclusion which can be drawn, both from the fact itself and from the cases.

In *Ex parte Dorr*, 3 How. 103, 11 L.ed. 514, the prisoner had been sentenced for life by the Rhode Island state court for treason. The state officials would not permit his lawyer to see him to ascertain if he wanted to take his case to the United States Supreme

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[22]We are not here speaking of the extraterritoriality problem; just the question of the power to issue the writ.

Court by writ of error. Treadwell, the attorney, sought a writ of habeas corpus from this Court to bring Dorr up to ascertain whether he wanted to petition the Court. This Court, after quoting from Section 14 of the Judiciary Act of 1789, including the "all writs" portion thereof ruled that (11 L.ed. at 515):

> "The power given to the courts by this section . . . as regards the writ of *habeas corpus* is restricted by the proviso to cases where a prisoner 'is in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable."

Accordingly, this Court had no power to issue the writ even under such extreme circumstances, notwithstanding the presence of the "all writs" statute. Accord: *Taylor v. Carryl*, 20 How. 583; *Ex parte Cabrera*, 1 Washington Reports 232 (CC 3 1805).

So today under section 2241. To the extent, if at all, that section 1651 gives the power to issue the writ of *habeas corpus*,[23] such power is modified and restricted by 2241. Section 2241 is today a limitation upon section 1651 just as much as was the habeas corpus por-

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[23]And not even *United States v. Hayman*, 342 U.S. 305 suggested that such power was given in 1651. Indeed it took pains to point out (pg. 220): "This is not a habeas corpus proceeding."

tion of Section 14 of the 1789 Judiciary Act a limitation upon the "all writs" portion of that section. And just as in 1789, the court's power today to issue writs of habeas corpus is governed by the section which deals specifically with that writ. Since Congress, in 1948, put into section 2241 provisions for the courts to issue writs of habeas corpus to bring a prisoner "into court for trial" (the writ of *habeas corpus ad prosequendum*), power so to do is governed by 2241; section 1651 has no longer anything to do with it.

This is simply the application of the doctrine that the special controls the general.

The same theory was applied in *In re Boles*, 48 Fed. 75 (CCA 8 1891) where the circuit court of appeals held that it had no power to issue a writ of habeas corpus to a prisoner outside its circuit even though the attack be on a conviction by a court within the circuit. Thus, then, when Congress makes specific provision for a particular writ—here, *habeas corpus ad prosequendum* —the court's power with relation thereto is controlled by the specific provisions of 28 USC 2241 and not by 28 USC 1651, the general "all writs" provision.

Accordingly, section 1651 is inapplicable today as a source of power for the district courts to issue writs of *habeas corpus ad prosequendum*. And, since, as we have shown above under Point II, A, the "within their respective jurisdictions" clause of 2241 is a territorial limitation, the district court here had no power to issue the writ for execution outside its district.

C.

The Territorial Limitation on Habeas Corpus Is Largely the Result of the Government's Argument to This Court in Other Cases.

We believe it only fair to point out that the position taken, and the argument made to this Court, by the Government has been a large and important factor in the establishment of the rule of territorial limitation upon the power of the district courts to issue writs of habeas corpus. In cases before this Court involving the Great Writ where there appeared to be ever so much reason for not limiting the writ territorially, the Government argued to the contrary. Thus, in *Hirota v. MacArthur*, 338 U.S. 197 (1948), the Government urged upon this Court (Brief in Opposition to Motion for Leave to File Petition for Writ of Habeas Corpus, pg. 34):

> "... [T]he structure of our habeas corpus statute, its legislative history, and historical background, support the conclusion that detention within the territorial jurisdiction of a district court is a necessary condition to the issuance of a writ of habeas corpus. *If changes are to be made, Congress must make them.*" (Italics added)[24].

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[24]Previous thereto, in *Ahrens v. Clark*, 335 U.S. 188, the Government had persuaded the two lower courts that the district court's power was limited territorially. In their brief in this Court, the Government said (p. 10, f.n. 7): "In the courts below the Government contended that the district court had no jurisdiction because the proceedings were not brought in the district in which the petitioners were detained." And even though in *Ahrens* the Government was willing to waive the point, it still maintained its territorial position. Thus it told this Court (Br. p. 14): "Accordingly we submit that, aside from the Government's present willingness to waive the objection *for the purposes of this case only*, there is no basis for reversing the courts below with respect to this jurisdiction ground for decision." (Italics added)

We do not believe that the Government can, as in the well-known story about Abraham Lincoln when acting as attorney for two different clients, take one position in the morning case and the opposite position in the afternoon case and contend that "This afternoon, your honor, I am right." The Government, when it has induced this Court by argument to set down a principle of law that is clear and concise, should not be permitted to change its position simply to suit its convenience at the time. (*Cf. Berger v. United States*, 295 U.S. 78, 88; *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23-24; and see *Jones v. United States*, 362 U.S. 257, 263: "to hold to the contrary . . . would be to permit the Government to have the advantage of contradictory positions . . .")

Probably the best argument for the territorial limitation of the habeas corpus statute and for adherence to the rule that if changes are to be made, Congress and not the courts should make them, was made in the Government's brief before this Court in *Johnson v. Eisentrager*, 339 U.S. 763. That case, and the Government's argument therein, are especially important and weighty because of the strong moral position of the prisoners there who had been convicted by United States officials, were then incarcerated by United States officials and where there was no other forum to which they could go to challenge the legality of their imprisonment.[25]

We take the liberty of quoting at length from the Government's brief:

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[25] *Cf. Parker v. Ellis*, 362 U.S. 574, especially in light of the dissent therein.

Pg. 15

"ARGUMENT

"I

"A Federal District Court Is Without Jurisdiction to Issue a Writ of Habeas Corpus Where the Prisoner-Applicant Is Confined Beyond the Territorial Jurisdiction of the Court, Regardless of Whether He Is or Is Not Confined Within the Territorial Limits of Some Federal Court Having Jurisdiction to Issue the Writ

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"A. *The Ahrens decision*

". . . [T]he decision (in Ahrens) was that the presence of the petitioners within the territorial confines of the district court was an essential prerequisite attached by Congress to the court's power to act at all. . ."

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"If, in other words, a court lacks *power to act* because the applicant for relief is without its territorial confines, the fact that no other court happens to have power to act is, perforce, an irrelevant consideration. . . . For, as stated in *McGowan v. Moody*, 22 App. C.D. 148, 158, which is cited with apparent approval in the *Ahrens* opinion (335 U.S. at 190):

The question is one of power, and not of the expediency of its exercise in the particular case, because there may happen to be no other tribunal in which relief may be had.

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". . . The holding in that case (Ahrens) was that where there is no detention within the dis-

trict, there is by congressional mandate a total absence of power to issue the writ—not merely that the fact of detention outside the district justifies or requires the non-assertion of admitted power in the interest of orderly administration. And, that being so, as we have said, both reason and authority dictate that the result cannot be otherwise merely by virtue of the extrinsic [pg. 21] consideration that the place of detention happens not to be within the territorial limits of any federal court.

"B. *The Federal statutes and the District of Columbia Code.*—It seems clear from a reading of the habeas corpus provisions of the general federal statutes as a whole (28 USC [1948 rev.] 2241-2255 that Congress never contemplated that a federal court or judge should have power to issue a writ of habeas corpus where the prisoner-applicant for the writ was not confined within the territorial jurisdiction of such court or judge. The *Ahrens* opinion mentions some of the legislative indicia of this congressional intent (see 335 U.S. at 189-191), especially the limiting words 'within their respective jurisdictions' in §2241 (formerly 28 U.S.C. [1946 ed] 452). Further evidence is to be found in the fourth paragraph of §2242 providing that—

> If addressed to the Supreme Court, a justice thereof or a circuit judge [*i.e.* the application for the writ] shall state the reasons for not making application to the district court of *the district in which the applicant is held.* [Italics added.]

And the second sentence of § 2241 (a) (see pp. 2-3, *supra*) states that—

The order of a circuit judge [granting a writ of habeas corpus] shall be entered in the records of [pg. 22] *the district court of the district wherein the restraint complained of is had.* [Italics added.]"

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"C. *State and territorial legislation.*

". . . While it is recognized, of course, that the provisions of these statutes have no authoritative bearing on the question of the reach of the writ under federal law, it is not without significance, we think, that in every instance, either in explicit terms or by clear implication, jurisdiction to issue the writ is limited by these statutes to cases where the detained petitioner is confined within the territorial limits of the state or territory, or even within narrower limits (the county, district, etc.) where the jurisdiction of the court or judge issuing the writ has narrower territorial jurisdiction. This universal conception of the writ as being thus jurisdictionally limited to the territory where the detained person is confined is persuasive evidence that this limitation inheres in the very nature of the historic writ, and that there was no intention on the part of Congress, when it enacted the habeas corpus statute, to make the writ perform a broader function."

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". . . We recognize the force of these considerations (that the states have seldom, if ever, been confronted with the jurisdictional problem in this case), but we believe, nevertheless, that the univer-

sality of the states' conception of the writ as inherently containing the jurisdictional limitation for which we contend demonstrates that this limitation was embodied in the writ as inherited from the common law. In these circumstances, it would require very clear and persuasive evidence to show that Congress, in enacting the federal habeas corpus statutes, intended to eliminate the limitation in question and thereby make the writ perform a broader function.

"It may be that it would be the part of wisdom and consonant with present-day conceptions to expand the traditional scope of the writ so as to make it serve to test, in American civil courts, the legality of detention occurring anywhere in the world, provided the detention is by authority of the United States, or its military or civilian officers. We submit, however, that if the traditional scope of, and jurisdictional limitations upon, the writ are thus to be expanded, it should be done, not by judicial construction, but by Congressional enlargement of the writ in the light of modern conditions."

Thus spoke the Government to this Court when it desired territorial limitation.

The district court's power to issue writs of habeas corpus to bring a prisoner "into court for trial" is embodied within "the whole scheme of the habeas corpus statute."[26] The Government's argument quoted above

[26]This language is from the Government's petition for writ of certiorai in *Johnson v. Eisentrager*, p. 7, f.n. 3: "the whole scheme of the habeas corpus statute is based on the assumption that there must be custody within the territorial jurisdiction."

applies to petitioner in this case to a "T". This court should not change the law depending upon whether it is the citizen or the Government who is making the territorial argument. As the Government so effectively urged upon this court in the *Johnson* case: if the traditional territorial jurisdictional limitation upon the writ of habeas corpus is to be expanded, it should be done, not by judicial construction, but by congressional enlargement.

III.

Petitioner Has Standing to Challenge the Authority of the District Court to Issue the Writ in Question (Reply to Respondent's Point III, pp. 30-33).

Initially, we submit, the matter is not before, and should not be considered by, this Court. The point was not passed upon by the court below, the case having been submitted on the merits [R. 25].[27] Accordingly, respondent not having filed a cross-petition for writ of certiorari, the question should not be passed upon herein (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 200). The general rule is that a point not pressed nor passed upon by the court below will not be reviewed here (*Duignan v. United States*, 274 U.S. 195, 200; *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225). We submit that that rule and not an exception should be applied in the case at bar.

In any event, petitioner does have standing to raise the issue. The cases relied upon by the Government

[27]It is true that respondent raised the point before the lower court in its motion to dismiss the appeal [R. 32]. However, upon oral argument it was stipulated that the appeal itself be submitted to the court on the merits [R. 25], this was done and the court ruled on the merits *(ibid)*.

(pg. 31) are inapposite. In none of them was the fundamental question of the *jurisdiction* of the court to act extraterritorially involved. Petitioner is not here claiming immunity from a second prosecution (*Ponzi v. Fessenden,* 258 U.S. 254), nor is he claiming that a court before which he *was* brought for trial did not have the right to try him (*United States ex rel. Buchalter v. Warden of Sing Sing Prison,* 141 F. 2d 259 (CA 2 1944); *U.S. ex rel. Spellman v. Murphy,* 217 F. 2d 247 (CA 7 1954); *Rawls v. United States,* 166 F. 2d 532 (CA 10 1948).[28]

Petitioner is claiming that the order which affects him so directly was made without jurisdiction of the court. Since parties cannot waive lack of jurisdiction (*Ahrens v. Clark,* 335 U.S. 188, 193), it would seem clear that a person so vitally affected by the order has standing to call to the attention of the court the lack of jurisdiction.

Since "it is the duty of every court of its own motion to inquire into the matter (of jurisdiction) irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law," (*Minnesota v. Hitchcock,* 185 U.S. 373, 382; accord: *Cutler v. Rae,* 7 How. 729, 731), respondent cannot avoid inquiry into the issue on a theory that petitioner has no right to raise it.

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, this Court held that organizations listed by the Attorney General in connection with the Government's *internal* personnel problem and where no action was being taken against the organizations nor any-

[28] *Cf. Frisbie v. Collins,* 342 U.S. 519.

thing required of them, had standing to test the validity of the Attorney General's action. Answering the standing to sue argument, Mr. Justice Frankfurter, in his concurring opinion, pointedly said (341 U.S. at 157):

> ". . . The objection to judicial restraint of an unauthorized exercise of powers is not weighty."

Moreover, the question involved in this case is a procedural matter of substantial importance. In the exercise of this Court's supervisory authority over the administration of criminal justice in the federal courts (*McNabb v. United States,* 318 U.S. 332, 341) this Court has an obligation to the litigants and the bar, we respectfully submit, to settle the matter in issue. If it be a fact, as we contend, that the district court acted without jurisdiction, it is an unthinkable administration of justice that the practice be permitted to continue. Since the present type of procedure is the only one in which the question can be raised and decided,[29] this Court should decide it (*cf. Barrows v. Jackson,* 346 U.S. 249, 254-260; *Truax v. Raich,* 239 U.S. 33, 38).

If, however, petitioner be mistaken in his view of this matter, then, we respectfully suggest, the proper procedure would be to remand the case to the court below

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[29]By virtue of the principle established in *Ponzi v. Fessenden,* 258 U.S. 254 and effectuated in another form in *Frisbie v. Collins,* 342 U.S. 519. It is one thing to say that *after* a person has been brought before the court, he has no standing to challenge the means by which he was brought there. It is quite another thing to say that *before* the asportation, he has no standing to endeavor to prevent the happening of an illegal act—one which is in excess of the jurisdiction of the court. (*Cf. Hearst v. Black,* 87 F. 2d 68, 71 [CA DC 1936]).

for consideration by, and argument before, that court. Indeed, respondent not having raised in the district court the question of petitioner's right to challenge the writ [R. 14], it would appear that it is that court to which the question should first be presented in the event of a remand.

Conclusion.

The judgment of the court below should be reversed and the writ of *habeas corpus ad prosequendum* ordered quashed.

Respectfully submitted,

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APPENDIX A.

Abstract of Provisions of 28 U. S. C. 1651 and Legislative Antecedents Thereto.

28 U. S. C. 1651 (1948)

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U. S. C. (1940) 342

Supreme Court power to issue prohibition and mandamus to district courts and any courts appointed under authority of United States.

Jud. Code 234 (1911)
same

R. S. 688 (1875)
same

1 Stat. 80 (1789)

Original and appellate jurisdiction of Supreme Court.

Power to issue prohibition and mandamus to district courts and courts appointed or persons holding office under authority of United States.

28 U. S. C. (1940) 376

Justice of Supreme Court and judge of district court given power to issue writs of ne exeat.

Jud. Code 261 (1911)
same

R. S. 717 (1875)

Same, except that in place of "district judge" the words are "circuit justice or circuit judge" and in place of "district court" the words are "circuit court."

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

1 Stat. 334 (1793)

Judge of Supreme Court given power to grant writs of ne exeat and injunction in cases where may be granted by supreme or circuit court.

28 U. S. C. (1940) 377

Supreme Court and district courts power to issue writs of scire facias.

S. Ct., C. C. A. and Dist. Ct. power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeably to the usages and principles of law.

Jud. Code 262 (1911)
same

R. S. 716 (1875)

Same except courts listed were "Supreme Court, circuit and district court."

1 Stat. 334 (1793)

Judge of Supreme Court given power to grant writs of ne exeat and injunction in cases where may be granted by supreme or circuit court.

1 Stat. 81 (1789)

All the before mentioned courts of U. S. shall have power to issue * * * all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Abstract of Provisions of 28 U. S. C. 2241 and Legislative Antecedents Thereto.

28 U. S. C. 2241 (1948)

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 U. S. C. (1940) 451

Supreme Court and District Courts shall have power to issue writs of habeas corpus.

28 U. S. C. (1940) 452

Justices of Supreme Court, judges of CCA and of district courts, *within their respective jurisdictions* shall have power to grant writs of habeas corpus. Circuit court given same power to issue writs of habeas corpus *within his circuit* as district judge within his district.

28 U. S. C. (1940) 453

The writ of habeas corpus shall in no case extend to a prisoner in jail unless where

1. same as 2241
2. same, except "pursuance of a law of the United States" instead of "Act of Congress"
3. same except "law" and "treaty" instead of "laws" and "treaties"
4. same except "except whereof" instead of "effect of which"
5. same except "prisoner" instead of "him" and "or for trial" does not appear.

43 Stat 940 (1925)

Provides for appeal to CCA in habeas corpus proceeding.

Circuit judge same power to grant habeas corpus within his circuit as district judge has within his district.

36 Stat. 1167 (1911)

Any power or duty conferred upon circuit court, is conferred upon the district courts.

R. S. 751 (1875)

Supreme Court and circuit and district courts shall have power to issue writs of habeas corpus.

R. S. 752 (1875)

Several justices and judges of said courts, *within their respective jurisdictions*, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the restraint of liberty.

R. S. 753 (1875)

Same as 453 above

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

14 Stat. 385 (1867)

Courts of United States and justices and judges, *within their respective jurisdictions* power to grant habeas corpus.

(1) in all cases where persons may be restrained of liberty in violation of constitution or of any treaty or law of the United States.

Provides for complete procedure on habeas corpus in lower court and on appeal to circuit court and Supreme Court.

5 Stat. 539 (1842)

Supreme Court justices or judge of any district court *in which a prisoner is confined*, power to grant habeas corpus.

(1) where person, subject or citizen of foreign state is confined under any authority or law of the United States.

Provides for procedure for appeal to circuit courts and Supreme Court.

4 Stat. 634 (1833)

Supreme Court justices or judge of any district court shall have power to grant habeas corpus.

(1) where person committed or confined by any authority or law for any act done, or omitted to be done, in pursuance of a law of the United States.

1 Stat. 81 (1789)

All before-mentioned courts of United States shall have power to issue writs of *scire facias*, habeas corpus * * *.

Supreme Court justice and judges of district courts shall have power to grant writs of habeas corpus

1. For the purpose of an inquiry into cause of commitment

Provided habeas corpus shall not extend to prisoners in jail unless

(1) Where in custody under authority of United States or committed for trial before some court of same, or

(2) Or are necessary to be brought into court to testify.

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

14 Stat. 385 (1867)

Courts of United States and justices and judges, *within their respective jurisdictions* power to grant habeas corpus.

(1) in all cases where persons may be restrained of liberty in violation of constitution or of any treaty or law of the United States.

Provides for complete procedure on habeas corpus in lower court and on appeal to circuit court and Supreme Court.

5 Stat. 539 (1842)

Supreme Court justices or judge of any district court *in which a prisoner is confined*, power to grant habeas corpus.

(1) where person, subject or citizen of foreign state is confined under any authority or law of the United States.

Provides for procedure for appeal to circuit courts and Supreme Court.

4 Stat. 634 (1833)

Supreme Court justices or judge of any district court shall have power to grant habeas corpus.

(1) where person committed or confined by any authority or law for any act done, or omitted to be done, in pursuance of a law of the United States.

1 Stat. 81 (1789)

All before-mentioned courts of United States shall have power to issue writs of *scire facias*, habeas corpus * * *

Supreme Court justice and judges of district courts shall have power to grant writs of habeas corpus

1. For the purpose of an inquiry into cause of commitment

Provided habeas corpus shall not extend to prisoners in jail unless

(1) Where in custody under authority of United States or committed for trial before some court of same, or

(2) Or are necessary to be brought into court to testify.

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

14 Stat. 385 (1867)

Same

5 Stat. 539 (1842)

Same

4 Stat. 634 (1833)

Same

1 Stat. 81 (1789)

Same

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

14 Stat. 385 (1867)

Same

5 Stat. 539 (1842)

Same

4 Stat. 634 (1833)

Same

1 Stat. 81 (1789)

Same

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1960.

Paul John Carbo, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

The sole question in this case is whether the United States District Court for the Southern District of California has jurisdiction to issue a writ of *habeas corpus ad prosequendum* directing a New York City prison official to deliver petitioner, a prisoner of that city, to California for trial on an indictment pending in the California court.[1] Both the District Court and the Court of Appeals have held that such jurisdiction does exist. 277 F. 2d 433. Recognizing that the effective administration of criminal justice required our decision on the point, we granted certiorari. 363 U. S. 802. We affirm the judgment.

Petitioner, one of five defendants indicted on September 22, 1959, in the District Court for the Southern District of California on charges of extortion and conspiracy,[2] was arrested in Baltimore, Maryland, where he posted bond returnable to the California court. Before appearing in California pursuant to his obligation under the bond, petitioner pleaded guilty to three misdemeanor charges in

[1] The Government has raised the question of petitioner's standing to challenge the writ (cf. *Ponzi* v. *Fessenden*, 258 U. S. 254), which point it waived by stipulation in the Court of Appeals. In light of the circumstances under which the case reaches us we do not believe that the point is well taken.

[2] 18 U. S. C. §§ 875, 1951.

New York City and was sentenced to serve a two-year term in the New York City Prison, in addition to payment of a fine. Pursuant to a writ of *habeas corpus ad prosequendum* issuing from the California court to the New York City prison authorities, the petitioner appeared in custody before that court, was arraigned and pleaded not guilty to the indictment. Upon petitioner's request the court ordered that he be returned to the New York City Prison in custody in order to obtain counsel and that he thereafter be returned [3] to California in time for trial on the indictment set for March 29, 1960. In order that petitioner might meet the obligation of his bond, as well as that of the latter order, the court, on March 16, 1960, again issued a writ of *habeas corpus ad prosequendum* to the New York City prison official directing the return of the petitioner for trial on March 29, 1960. On the same date and before it could be served, the petitioner moved to quash the writ. His sole ground of objection was that the United States District Court for the Southern District of California had no power to issue the writ to an officer located outside of its territorial limits. The contention is bottomed on the language of 28 U. S. C. § 2241 as codified in 1948.[4] We have concluded that the issuance of the

[3] The order was as follows:

"Defendant appears without counsel and requests permission to enter his plea and be permitted to return to New York and obtain counsel there and return here for trial.

"Defendant Carbo pleads not guilty. . . .

"Court Orders cause as to Defendant Carbo set for trial with co-defendants on March 29, 1960, 9:30 A. M., and directs that Defendant Carbo be returned to New York for the purpose of obtaining counsel and be returned here in time for trial."

[4] 28 U. S. C. § 2241 provides:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be

writ of *habeas corpus ad prosequendum* was within the jurisdiction of the court as authorized by the Congress in § 2241.

This is the first time this Court has undertaken a construction of the statutory authority for the issuance of writs of *habeas corpus ad prosequendum* since Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch 75 (1807), interpreted the language of the First Judiciary Act, 1 Stat. 81–82 (1789). It seems, therefore, both appropriate and in our view necessary, to first trace the course followed by congressional action granting judicial power to issue writs of *habeas corpus* generally.

Section 14 of the First Judiciary Act gave authority to

> "all the . . . courts of the United States . . . to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And . . . either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the

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entered in the records of the district court of the district wherein the restraint complained of is had.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

"(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right . . . ; or

"(5) It is necessary to bring him into court to testify or for trial."

cause of commitment.—*Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81–82 (1789).

We are indeed fortunate to have the benefit of the close scrutiny to which Chief Justice John Marshall subjected § 14 in *Ex parte Bollman, supra*. Initially, the Chief Justice observed that "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." 4 Cranch, at 93–94. Mindful perhaps of his own observation the preceding year that "There is some obscurity in the act of Congress," *Ex parte Burford*, 3 Cranch 448, at 449, he then proceeded to analyze the meaning of the writ as described in § 14. He recognized that the term *habeas corpus* "is a generic term" including many species of that writ. It encompassed, he concluded, in addition to the Great Writ (*habeas corpus ad subjiciendum*, for an inquiry into the cause of restraint) the writ *habeas corpus ad prosequendum*. The "Great Chief Justice" noted, however, that when used in the Constitution,[5] that is, "when used singly—when we say *the writ of habeas corpus*, without addition, we most generally mean that great writ" traditionally used to test restraint of libery. *Ex parte Bollman, supra*, at p. 95.

The Chief Justice, following the English practice, particularly 3 Blackstone, Commentaries* 129, noted that the writ *ad prosequendum* was necessary to remove a prisoner in order to prosecute him in the *proper jurisdiction* wherein the offense was committed. In his discussion of the common usage of the various writs he recognized in *Ex*

[5] Art. I, § 9, cl. 2.

parte Bollman, *supra*, that the Congress had without qualification authorized the customary issuance of the writ *ad prosequendum* by a jurisdiction not the same as that wherein the prisoner was confined.

Following the Judiciary Act of 1789, there came a series of legislative amendments dealing with habeas corpus, but significantly, all related solely to the usages of the Great Writ.[6] Simultaneously with the expansion of the Great Writ, there developed from the common source, § 14 of the first Judiciary Act, a second line of statutes—the "All writs" portion of § 14, in large measure the first sentence of that section, devolved by a process of addition along a course parallel to but separate from the habeas corpus provisions. Upon revision of the federal statutes in 1875, the general power of courts to issue writs of habeas corpus, which was a part of the express grant in the first sentence of § 14, disappeared from the language of the statutes derivative from the all writs portion of the first sentence, R. S. § 716 (1875), which, after further amendment, is known today as 28 U. S. C. § 1651.[7] This general power, was, however, retained in the first of the three reorganized sections of the Revised Code dealing with habeas corpus, R. S. § 751 (1875),[8] and served as the modern version of the authority for writs *ad prosequendum* upon which Marshall had relied in *Ex parte Bollman*.

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[6] The habeas corpus provisions of § 14 of the original Judiciary Act, 1 Stat. 81 (1789) were amended by 4 Stat. 634 (1833), 5 Stat. 539 (1842), 14 Stat. 385 (1867), R. S. §§ 752–753 (1875), and 43 Stat. 940 (1925).

[7] R. S. § 716 (1875): "The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

[8] R. S. § 751 (1875): "The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus."

The second section in the 1875 Revision of the laws on habeas corpus, R. S. § 752, authorizing issuance of the Great Writ by justices and judges, included the jurisdictional limitation [9] which had been imposed for the first time [10] in 1867, 14 Stat. 385. The motive for that limitation can be traced to the position reportedly taken by Chief Justice Chase in rejecting an application for the Great Writ from a prisoner on the ground that he was incarcerated outside his circuit. Mindful of the position taken by the Chief Justice, the Senate amended the first draft of the bill expanding once again the usage of the Great Writ and inserted the phrase "within their respective jurisdictions"—an obvious limitation upon the action of individual judges and justices in exercising their power to issue the Great Writ.[11] The debates in Congress indicate that it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat.[12]

The third section in the revised arrangement, R. S. § 753, collected all the instances in which the Great Writ might issue on behalf of imprisoned applicants.

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[9] R. S. § 752 (1875): "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

[10] Actually, the 1842 extension of the Great Writ's availability to imprisoned applicants, 5 Stat. 830, had imposed a jurisdictional limitation upon its issuance—power to grant applications by foreign citizens was given only to Justices of the Supreme Court, and to judges of the District Court *in the district of confinement*.

[11] This decision, unreported, would appear consonant with a legitimate inference drawn from the jurisdictional limitation expressed in 1842, cf. note 10, *supra*, that Justices of the Supreme Court should limit their considerations to applications from within their assigned circuits, just as district judges were limited to their district.

[12] Cong. Globe, Part 1, p. 730; Part 2, pp. 790, 899, 39th Cong., 2d Sess.

From this history it becomes obvious that the Congress had continual concern for the Great Writ—*habeas corpus ad subjiciendum*. Exclusively to it did it give attention, and only upon its issuance did it impose a limitation. The other species of the writ, including that involved here—*habeas corpus ad prosequendum*—continued to derive authority for their issuance from what had been the first sentence of § 14 of the First Judiciary Act, which was not repealed until the 1875 Revision of the Statutes at Large, when it was re-enacted as two separate and distinct sections, R. S. § 716 (all-writs) and R. S. § 751 (general habeas corpus).

The Congress had obviously made an attempt to completely separate the habeas corpus provisions from those concerning other writs. However, just as in 1789 Marshall had found authority for the writ *ad prosequendum* in the reference to habeas corpus in the first sentence of § 14, so too in 1875 its authority was constituted in the lineal derivative of that sentence, R. S. § 751, which gave courts without jurisdictional limitation, as distinguished from individual judges, R. S. § 752, the power to issue writs of habeas corpus generally. *State* v. *Sullivan*, 50 F. 593, 598. Clearly, the use of the phrase in § 751 was generic, whereas the grant of authority to judges "within their respective jurisdictions" in R. S. § 752 was specific, meaning only the Great Writ.[13]

Thus, the *ad prosequendum* writ, necessary as a tool for jurisdictional potency as well as administrative efficiency, extended to the entire country. The Great Writ, however, designed to relieve an individual from oppressive confinement, could well have been and properly was, at least as early as 1842,[14] issuable only in the district of confinement. This was in consonance with convenience,

[13] We do not decide whether the writ *habeas corpus ad testificandum* was intended by Congress to be subject to the 1867 jurisdictional limitation. Cf. *Edgerly* v. *Kennelly*, 215 F. 2d 420.

[14] See note 10, *supra*.

necessity and avoidance of inordinate expense—considerations remarkably unpersuasive when viewed in light of the role of the writ *ad prosequendum*.

This same trichotomy of sections in the revised statutes, setting out the statutory authority for habeas corpus, was continued through the 1911 revision of the Judicial Code which did not affect by repeal or significant amendment the existing law on the writs.[15] In 1925, when the Judicial Code was amended, 43 Stat. 940, some attention was again paid to habeas corpus, but only to assign to individual judges of the Courts of Appeals the same power within their circuits as District Court judges had within their districts—an obvious adherence to the tradition embodied in R. S. § 752 which dealt only with the Great Writ and imposed the jurisdictional limitations on its issuance. In 1948, when further clarification of the United States Code [16] was thought desirable, the statute took its present form, and for the first time in the legislative history of the writ of habeas corpus there was made explicit reference to the writ *ad prosequendum* in a statute.[17] Although the three sections were merged into one, it was done only "with changes in phraseology necessary to effect the consolidation." Specifically disclaimed was any intent to change the existing law on habeas corpus. That the Revisor considered the new section to deal almost exclusively with the Great Writ, in spite of its authorization of writs *ad testificandum* and *ad prosequendum*, is obvious from his own note: "Words 'for the purpose of an inquiry into the cause of restraint of liberty' . . . were omitted as merely descriptive of the writ." [18] However, as reconstructed in § 2241, the au-

[15] 36 Stat. 1167.

[16] R. S. §§ 751–753 (1875) were at that time included as §§ 451–453 of Title 28 of the United States Code.

[17] See note 4, *supra*.

[18] H. R. Rep. No. 2646, 79th Cong., 2d Sess., p. A169; H. R. Rep. No. 308, 80th Cong., 1st Sess., pp. A177–178.

thority of courts as well as of individual justices and judges, was now provided in a single sentence which ostensibly imposed upon all the same jurisdictional limitation previously imposed only as to the Great Writ's issuance by individual judges.

Since from its first usage the limiting phrase had always been a qualification of the authority of individual judges to issue the Great Writ, we see no reason to read into the new codification a change of meaning specifically disclaimed by the Revisor. It is our conclusion, therefore, that the territorial limitation refers solely to issuance of the Great Writ with which the bulk of the section is concerned.

We feel that there is no indication that there is required today a more restricted view of the writ *habeas corpus ad prosequendum* than was necessary in 1807 when Chief Justice Marshall considered it. Cases reported from at least three Circuit Courts of Appeals, involving extraterritorial writs *ad prosequendum* issued both before and after the 1948 revision, *Taylor* v. *United States*, 238 F. 2d 259 (C. A. D. C. Cir.); *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147 (C. A. 7th Cir.); *Hill* v. *United States*, 186 F. 2d 669 (C. A. 10th Cir.); and perhaps four, cf. *Vanover* v. *Cox*, 136 F. 2d 442 (C. A. 8th Cir.), indicate as an accepted, or at least there unchallenged [19] interpretation of the statutes, that the writ suffers no geographical limitations in its use.

Moreover, this construction appears neither strained nor anomalous. Much was borrowed from our English

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[19] We are not unmindful of the terse Third Circuit dictum to the contrary in *Yodock* v. *United States*, 196 F. 2d 1018, and the divergent view of at least two District Courts. However, *Phillips* v. *Hiatt*, 83 F. Supp. 935, considered § 2241 as derived solely from R. S. § 752 (1875); and *In the Matter of Karol Van Collins*, 160 F. Supp. 165, relied, without distinction, upon *Ahrens* v. *Clark*, 335 U. S. 188, which dealt only with the Great Writ.

brethren. Although our own practice has limited the jurisdiction of courts and justices to issue the Great Writ, we have never abandoned the English system as to the *ad prosequendum* writ. Cf. 1 Chitty's Criminal Law 132 (1847), and 4 Bacon's Abridgment 566 (1856) for discussion of similar process. After almost two hundred years, we cannot now say it has been abandoned by a Congress which expressly said it intended to make no substantive changes. The more strongly are we led to this construction by recognition of the continually increasing importance assigned to authorizing extraterritorial process where patently desirable. Cf. Fed. Rules Crim. Proc., 4 (c)(2) and 17 (e)(1). And it is the more so here where an accommodation is so important between the federal and state authorities. *Hebert* v. *Louisiana*, 272 U. S. 312, 315–316 (1926). That comity is necessary between sovereignties in the administration of criminal justice in our federal-state system is given full recognition by affording through the use of the writ both respect and courtesy to the laws of the respective jurisdictions.[20]

Viewed in light of this history, petitioner's reliance upon cases dealing solely with territorial limitations upon issuance of the Great Writ and the criminal process authorized by 28 U. S. C. § 1651(a), unrelated to habeas corpus, is misplaced. *Ahrens* v. *Clark*, 335 U. S. 188 (1948), is clearly inapposite as is also *United States* v. *Hayman*, 342 U. S. 205 (1952), in which habeas corpus was not even involved.[21] To the extent that lower court decisions have relied upon a contrary construction of § 2241, we disapprove of their conclusions.[22]

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[20] In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation.

[21] That case, as well as *Price* v. *Johnston*, 334 U. S. 266, dealt with process *in the nature of habeas corpus*, the authority for which was not derived from the *habeas corpus* statutes.

[22] See note 19, *supra*.

Even were we to have agreed with petitioner's argument, we would nonetheless be constrained to recognize that, within the modern attitude adopted in *Ex parte Endo*, 323 U. S. 283 (1944), rigid formulae, even as to the issuance of the Great Writ, may be tempered by factual considerations requiring the decision that its "objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court" after the suit is begun. At p. 307. Such facts are present here. Petitioner Carbo filed an appearance bond, and submitted himself to the jurisdiction of the District Court by his personal appearance and plea of not guilty upon arraignment. Permission for his return to New York before trial was granted only upon his promise to, and the condition that, he return. Implicit in his request for the order of return to New York was his consent to the obligation imposed upon his custodians to return him to California promptly. The second writ of *habeas corpus ad prosequendum*, the only writ here involved, served only as assurance to petitioner and to the court that he would not suffer default in the obligation of his bail. Just as the mere subsequent removal of the prisoner in *Endo* failed to render that application beyond the court's power to consider, so too here, in a similar vein, we cannot say that these factors have fastened onto petitioner so unsecure a leash as to suffer his escape from the jurisdiction of the California court. We must, therefore, in any event, affirm on these facts.

Affirmed.

MR. JUSTICE WHITTAKER, believing that, on the peculiar facts here involved, the writ, though denominated "Habeas Corpus Ad Prosequendum," had the effect of and properly should be regarded as a subpoena issued under Paragraph (a) and properly served under Paragraph (e)(1) of Rule 17 of Federal Rules of Criminal Procedure, concurs in the result of the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1960.

Paul John Carbo, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1961.]

Mr. Chief Justice Warren, with whom Mr. Justice Black joins, dissenting.

I cannot agree with the decision of the Court. We have said that "apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial," *Ahrens* v. *Clark*, 335 U. S. 188, 190, and that as a general rule "a United States district court cannot issue process beyond the limits of the district." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 467–468. These principles were applied to writs of *habeas corpus ad subjiciendum* in *Ahrens* v. *Clark*, *supra*, where we held that the words "within their respective jurisdictions" as used in 28 U. S. C. § 2241 created a territorial limitation upon the *habeas corpus* jurisdiction of federal judges and courts. Today we are departing from *Ahrens* and the principles on which our decision in that case rested, for the Court holds that the restrictive language of § 2241 is inapplicable to writs of *habeas corpus ad prosequendum*. I can see no justification for these variant interpretations of the same language in the same statute.

We are not helped by the tortured history of § 2241 and its antecedents, since the legislative material relied on by the Court is, to say the least, ambiguous,[1] and could

[1] Chief Justice Taft, speaking for the Court in *Ponzi* v. *Fessenden*, 258 U. S. 254, construed § 753 of the Revised Statutes, one of the enactments relied upon by the Court, as imposing a territorial limita-

be used to support inferences diametrically opposed to those drawn by the Court. For example, the fact that the first statutory reference to the writ of *habeas corpus ad prosequendum* does not appear until the enactment of § 2241 reasonably implies that none of the prior statutory history is relevant insofar as that writ is concerned, and that in codifying a unified *habeas corpus* statute in 1948, Congress intended the restrictive language of the first paragraph of § 2241 to apply to all of the writs thereafter enumerated, among which are both the writ *ad subjiciendum* and the writ *ad prosequendum*.

Although the specific question presented by this case is a matter of first impression for us, the Court concludes that, since three, and perhaps four, Circuit Courts of Appeals have upheld the issuance of extraterritorial writs *ad prosequendum*, its interpretation of the statute has become an "accepted" one. But at the same time, the Court recognizes that there are other cases in which lower courts have "relied upon a contrary construction of § 2241." In each of these cases, the District Court overruled a defendant's request for a speedy trial by holding that since its orders could not "run beyond its territorial jurisdiction," it had no power to issue a writ *ad prosequendum* to bring to trial a defendant who was incarcerated outside of its district. *In the Matter of Van Collins*, 160 F. Supp. 165, 167 (D. C. Me.); *Phillips* v. *Hiatt*, 83 F. Supp. 935, 938 (D. C. Del.). Cf. *Edgerly* v. *Kennelly*, 215 F. 2d 420 (C. A. 7th Cir.); *Yodock* v. *United States*, 196 F. 2d 1018 (C. A. 3d Cir.). In view of these

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tion upon the District Court's power to issue a writ of *habeas corpus ad prosequendum*. He said:

"Under statutes permitting it, he [the prisoner] might have been taken under the writ of habeas corpus to give evidence in a federal court, or to be tried there *if in the same district*' § 753, Rev. Stats. . . ." *Id.*, at 261. (Emphasis added.)

cases, it can hardly be said that the Court's interpretation has become a generally "accepted" one.

The court below justified the District Court's action not upon § 2241, but rather upon the all writs statute, 28 U. S. C. § 1651. This Court refrains from relying on that section, as, indeed, it should, since the general provisions of § 1651 should not be read as expanding the jurisdictional limitations created by Congress with regard to a specific writ.[2] See *Price* v. *Johnston*, 334 U. S. 266, 279; *Adams* v. *McCann*, 317 U. S. 269, 272–273.

I do not say that the federal courts should not have the power to issue extraterritorial writs *ad prosequendum*. There are persuasive reasons for conferring such authority upon the courts, and Congress is perfectly free to do so. However, if the jurisdiction of the federal courts is to be expanded, and if the traditional territorial limitation is to be abandoned, then Congress should specifically so indicate.[3] But Congress has not done so, and until it

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[2] The lower court's reliance upon *United States* v. *Hayman*, 342 U. S. 205, is misplaced. There the Court upheld the issuance of an extraterritorial writ in the nature of *habeas corpus*, saying that the authority to issue the writ under § 1651 was necessarily inferred from the provisions of 28 U. S. C. § 2255. This case does not involve § 2255; nor does it involve any other statute which could be read as conferring extraterritorial authority upon the federal courts.

[3] In those few instances when Congress intended to extend the territorial jurisdiction of the federal courts it has specifically and unambiguously indicated that intent. S. Rules 4 (c) (2) and 17 (e) (1), Fed. Rules Crim. Proc., which read:

"Rule 4. Warrant or Summons Upon Complaint:

"(c) Execution or Service; and Return.

"(2) Territorial Limits. "The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States." [*Footnote 3 continued on p. 4.*]

does, we should not tamper with the present statutory scheme, except by following the customary procedure of adopting a special rule and submitting it to Congress for approval. Cf. Rules 4 (c)(2), 17 (e)(1), Fed. Rules Crim. Proc.

Finally, I must add a few words concerning the Court's dictum that, regardless of the interpretation placed upon § 2241, the California District Court had jurisdiction to issue the writ because the petitioner had previously appeared in that court, had entered a plea of not guilty, and had been permitted to return to New York to obtain counsel on condition that he would come back to California for trial. It is said that by virtue of this appearance, the District Court had "fastened . . . a leash" on the petitioner, and that this "leash" supported the issuance of the writ *ad prosequendum*. However, the Court ignores the fact that petitioner's initial appearance in California was also obtained by means of a writ of *habeas corpus ad prosequendum* addressed to the authorities of the New York City Prison. It ill behooves the Court to attempt to justify the issuance of an unauthorized writ of *habeas corpus* by relying upon jurisdiction that was acquired by an equally unauthorized writ.[4] This theory introduces an unwise and judicially engrafted bootstrap exception to § 2241. In my opinion, the "leash" relied upon by the Court is in reality no more than a rope of sand.

"Rule 17. Subpoena.

"(e) Place of Service.

"(1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

[4] The Court's reliance upon *Ex parte Endo*, 323 U. S. 283, is misplaced, because the District Court's initial jurisdiction in that case was unquestionably proper in all respects.